United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1043

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For the Second Circuit.

RICHARD A. GORDON, individually and as President of INDEPENDENT INVESTORS PROTECTIVE LEAGUE, an unincorporated association, and in behalf of the membership thereof and in behalf of all persons similarly circumstanced,

Plaintiffs-Appellants,

-against-

NEW YORK STOCK EXCHANGE, INC., AMERICAN STOCK EXCHANGE, INC. and MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. and BACHE & COMPANY, INC., individually and as representatives of all member firms of the NEW YORK STOCK EXCHANGE and AMERICAN STOCK EXCHANGE,

Defendants-Appellees.

On Appeal From The United States District Court For The Southern District Of New York

APPELLANTS' BRIEF

BADER AND BADER
Attorneys for Plaintiffs-Appellants
274 Madison Avenue
New York, N.Y. 10016
532-6860

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

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DOCKET NUMBER
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APPELLANT'S BRIEF

This is an Appeal from a Final Order and Judgment of the United States District Court for the Southern District of New York, which granted the Defendants' Motion to Dismiss and for Summary Judgment. Based upon this Decision, the District

Court did not consider the Plaintiff's Motion for a Class Determination.

STATEMENT OF THE CASE

The present action, brought by the Plaintiff GORDON both individually and as President of the Independent Investor Protective League (an unincorporated association having hundreds of members) constituted a broad-based anti-trust attack upon the methods of doing business of the Securities industry. Specifically, the following practices of the Securities industry were challenged:

1. The practice of the New York Stock Exchange, American Stock Exchange and Member Firms in fixing the rates of commission, charged investors for stock transactions.

2. The "surcharge" upon "small trades" and the "lower negotiated" rates on large trades.

3. The closed restrictive membership practices of the New York Stock Exchange and the American Stock Exchange.

The District Court, in a Written Opinion, granted the Defendants' Motion for Summary Judgment and to Dismiss the Complaint, upon the following grounds:

1. The fixed "Commission rates" imposed by the New York Stock Exchange and American Stock Exchange were necessary to make the Securities Acts work, and these rates were under the supervision of the Securities and Exchange Commission; thus making an Anti-Trust attack inappropriate.

2. The attack on the variable fixed commission rates charged by the Defendant Exchanges, depending upon the size of the transaction, were not prohibited by the Robinson-Patman Act because stock transactions are not "commodities".

3. The Plaintiff had no standing to complain with respect to the limited

restricted membership of the Defendant Exchanges because the Plaintiff did not apply for such Membership.

For the reasons set forth in this Brief, the Plaintiff contends that the Determination of the District Court was erroneous; that, at the very least, the issues in this action be remanded for trial and the Order and Judgment appealed from be reversed.

POINT ONE

FIXED COMMISSION RATES ARE A PER SE VIOLATION OF THE ANTI-TRUST LAWS

It is conceded, from the Affidavits submitted, that the Defendant Stock Exchanges (and with them the Defendant Brokerage firms) fixed Commission rates for investor transactions). Any Member firm who charges a commission rate lower

than the fixed mimimum is subject to expulsion from the Exchanges. This, of course, is a "classic" price fixing conspiracy which is a per se violation of the anti-trust laws. The Supreme Court of the United States, in a relative early case, United States vs. Trenton Potteries Co., 273 US 392, 397 (1927) had this to say:

> **** "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. **** "

Price fixing, of any type, is a per se violation of both Section 1 and Section 2 of the Sherman Act. See, for example, U.S. vs. Topco Associates, Inc., 405 US 596; Northern Pacific Railway Co. vs. U.S. 356 US1; U.S. vs. McKesson Robbins, Inc., 351 US 305; Schwegmann Bros. vs.

Calvert Distillers Corp., 341 US 384; Ford Motor Co. vs. Webster's Auto Sales, Inc., 361 Fed2nd 874 and Interphoto Corp. vs. Minolta Corp., 295 Fed Supp. 711 Aff'd 417 Fed 2nd 621.

There is basically no dispute that, were it not for the Provisions of the Securities Acts, fixed brokerage commissions would be clearly illegal. The illegality is heightened by the fact that there are penalties against any Exchange Member for failing to observe the fixed rates. The Supreme Court of the United States in the leading case of Silver vs. New York Stock Exchange, 373 US 341, held that the Securities Industry is not a "regulated industry" which exempts it from the Anti-Trust Laws. However, the Supreme Court did state in Silver that if an exemption was necessary in order to "make the Securities Acts work", such a situation might have to be considered at that time.

Kaplan vs. Lehman Brothers, 371 Fed 2nd 410, did hold that fixed Commission rates, since they were under the

"supervision" of the SEC would be exempted from the Anti-Trust Laws. However, this case, a Seventh Circuit Determination was impliedly overruled by the later case of Thill Securities Corp. vs. New York Stock Exchange, 433 Fed 2nd 264. In Thill, (which is now sub judice by the United States District Court after remand by the Court of Appeals), the Attorney General of the United States has proposed the elimination of all fixed Commission rates as violations of the Anti-Trust Laws.

The Court's attention is also called to the later decided case of Harwell vs. Growth Programs, Inc., 451 Fed 2nd 240.

The District Court took the position that the fixed Commission rates imposed by the Defendants herein were "approved" by the SEC and so were necessary in order to make the Securities Acts work. It is interesting to note, however, that the SEC, in two actions taken by the Plaintiff Independent Investor Protective League, specially, held that the Commission

did not fix Commission rates. In a memorandum submitted to this Court, in Docket No. 71-1924, in support of the Commission's Application to Dismiss the League's Petition for Judicial Review of its' action with respect to certain Commission rates imposed by the Defendant Exchanges, had this to say:

> **** "In the present case, the Commission conducted no proceeding--let alone a proceeding "to which . . . [petitioners were] a party"--that could have resulted in "judicial action" by the Commission. The Commission's letter of comment to the Exchange did not order the Exchange, petitioners or any other person to do or to refrain from doing anything. Nor did the letter "approve" or "disapprove" the Exchange's proposals. The letter was anything but a "definitive" determination "dealing with the merits" of the Exchange's rule amendments. **** "

In the subsequent Civil Action brought by the Independent Investor Protective League against the SEC, in the United States District Court for the District of Columbia, (Civil Action 1984-71), the Commission again denied that it had any power to fix Cimmission rates. Its' Brief read, in part, as follows:

> **** "However, the question of the type and extent of immunity that may flow from Commission determinations regarding exchange rules and practices need not be decided in this case. The appropriate forum for resolution of that question is in an antitrust action against a self-regulatory organization challenging its rules or the administration of such rules. Indeed, plaintiffs recognize that they may seek to challenge exchange rules directly; they have instituted suit against the New York Stock Exchange for this very purpose. **** "

and

**** "The suggestion that the Commission has "approved" or "disapproved" any exchange rule or practice by its informal comment letters is refuted by the Act itself. Under the Act, the exclusive method by which the Commission may disapprove the rules of an exchange is a proceeding under Section 19(b) "to alter or supplement" such rules. This is highlighted by the quite different powers that Congress vested in the Commission with respect to the rules of national securities associations, the other major self-regulatory force in the securities industry. Section 15A(j) of the Act, 15 U.S.C. 78o-3(j), provides that a national securities association must file any "change in or addition to" its rules before such rules take effect and that, if the proposed rules are inconsistent with specified provisions of the Act, "the Commission shall enter an order disapproving such change or addition. **** "

Obviously, therefore, the Commission rates complained of herein were not "approved" by the Commission at the time that these actions were instituted.

It is interesting to note the subsequent history of SEC--EXCHANGE dealings after the filing of the Brief referred to hereinabove. The SEC conducted considerably more extensive hearings in connection with Commission rates and have now issued a further "suggestion" that fixed Commission rates be phased out in April, 1975. The Defendant Exchanges have agreed to this "suggestion" by the SEC. The SEC conducted rather extensive hearings before issuing this 'suggestion" but the League's request to be heard at these hearings was not granted. The Commission was able to secure Dismissal of the League's Petition for Judicial Review, again, on the basis that it had issued no "Order". Quite obviously, therefore, based upon this history, there can be no doubt but that the SEC did not "approve" the Commission rates charged nor are these fixed Commission rates immune from the operation of the Anti-Trust Laws.

POINT TWO
THE DISCRIMINATION IN PRICE BETWEEN THE COMMISSION RATES BETWEEN LARGE TRADES AND SMALL TRADES IS ACTIONABLE

A discriminatory price differential which favors large customers over small customers is, of course, a violation of Sections1 and 2 of the Sherman Act. (American Tobacco Company vs. U.S. 147 Fed.(2nd) 93, affirmed 328 US 781., Vandervelde vs. Put and Call Brokers & Dealers Ass'n, 344 Fed. Supp. 118, US vs. Paramount Pictures, 334 US 131, US vs. Sugar Institute, 15 Fed. Supp. 817). Therefore, in any event, the "surcharge" on so-called "small trades" and the "negotiated rates" on so-called"large trades" are actionable.

However, the price differential are also actionable under the Robinson-Patman Act, (15 USC 13). In this connection the District Court held that stock tradings did not involve "commodities" as required under the Robinson-Patman Act and, it is admitted, there is authority for this proposition. However, it is submitted, with the expanding definitions of "commodities" that the rule involved should be otherwise. Plaintiff admits,however, that he has found no cases in support of this proposition.

The Court's attention is called, however, to Section 2(c) of the Clayton Act (15 USC 13(c) which forbids allowances or commissions to be granted except for services rendered and, it is

submitted, this Section also applies.

POINT THREE
PLAINTIFF HAS STANDING TO COMPLAIN WITH RESPECT TO THE RESTRICTED MEMBERSHIP OF THE DEFENDANT STOCK EXCHANGES AND REFUSAL OF ENTRY TO OUTSIDERS. THE FACT THAT PLAINTIFF DID NOT APPLY FOR MEMBERSHIP PRIOR TO THIS SUIT IS IMMATERIAL SINCE THE LAW WILL NOT REQUIRE A USELESS ACT

The District Court held that the plaintiff had no standing to complain concerning the restricted membership of the defendant stock exchanges and the closure of membership to outsiders because the plaintiff did not apply for membership in the defendant exchanges. However such an application, of course, would have been denied and the law does not require a party to perform a useless act (Cohen vs. Public Housing Administration 257 Fed.(2nd) 73.).

POINT FOUR
THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE TRIABLE ISSUES OF FACT WERE PRESENTED IN THIS CASE

While plaintiff urges that the facts in the present case and the concessions made by the parties would, in any event, warrant the grant of summary judgment in favor of the plaintiff, there is no question but that there may be triable issues of fact involved in this case. In the event that triable issues of

fact exist, of course, summary judgment is inappropriate. (Insurance Company of North America vs. Bosworth Construction Company, 469 Fed. (2nd) 1266; Eagle vs. Louisiana & Southern Life Insurance Company, 464 Fed. (2nd)607; Smith vs. Pittsburgh Gage & Supply Co., 464 Fed. (2nd) 870; Crystal City vs. Del Monte Corp. 463 Fed.(2nd) 976.).

In the present case there are, of course, a number of triable issues of fact. Among them are:

1- The extent of supervision of the Securities and Exchange Commission over the fixed commission rates charged by the defendant Stock Exchanges.

2- The reasonableness of the discriminatory rates charged for "large trades" as against those charged for "small trades".

3- The extent to which fixed commission rates inhibit free competition.

4- The reasonableness of the limited entry and restricted membership provisions of the defendant Stock Exchanges.

All of these matters are triable issues in this case and could not be disposed of merely upon affidavits.

CONCLUSION

THE ORDER AND JUDGMENT OF THE DISTRICT COURT GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS SHOULD BE IN ALL

RESPECTS REVERSED. THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR TRIAL. ALTERNATIVELY SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE PLAINTIFF. THE DISTRICT COURT ON REMAND SHOULD BE DIRECTED TO CONSIDER THE PLAINTIFF'S MOTION FOR A CLASS DETERMINATION.

Respectfully submitted

BADER and BADER
Attorneys for Plaintiff
274 Madison Avenue
New York NY 10016

BADER

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of March , 1974 at No. 1 Chase Man. Pl./25 Bwy./ and 1 Liberty Plaza deponent served the within appendix upon MILBANK, TWEED, HADLEY & McCLOY/LORD, DAM & LORD/ the and BROWN, WOOD, FULLER, CALDWELL & IVEY, respectively attys. for appellees NY Stock Exch/Amer. Stock Exch/ and therein, by delivering a true copy thereof to them personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attys. for appellees. Merrill, Lynch therein.

Sworn to before me,
this 29 day of March 19 74

Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973